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In the Supreme Court of the United States

No. 06-5247

JOHN F. FRY, PETITIONER

v.

CHERYL K. PLILER, Warden, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The truth-finding process was distorted beyond repair in the State of California's prosecution of John Francis Fry. Mr. Fry was convicted by jury in a trial during which evidence of third party guilt, which the State now concedes to be reliable, was excluded. Although error of this ilk "creates a grave risk of the wrongful conviction of the innocent[,]" Imwinkelried & Garland, *Exculpatory Evidence*, § 15-5 (3d ed. 2004), and although Mr. Fry has challenged his conviction on the basis of this error at every available step in post-conviction proceedings, the result of the irreparably distorted truth-finding process has yet to be rectified.

The State of California tried Mr. Fry three times for a double murder. The first two trials ended with evenly-split, deadlocked juries. In the third trial, the presiding judge unconstitutionally excluded what is now conceded to be the testimony of "the only unbiased witness presented by either" the prosecution or the defense — a witness whose proffered testimony was that her cousin confessed to the crime for which Mr. Fry is now imprisoned. Despite this egregious violation of Mr. Fry's right to present his defense, the jury in Mr. Fry's third trial deliberated for five weeks, and once declared itself to be deadlocked 7-5, before convicting Mr. Fry.

At no time during direct review of Mr. Fry's conviction did the California appellate judiciary recognize the profound constitutional violation that had occurred. Accordingly, the state appellate judiciary did not endeavor to determine whether the constitutional error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967).

In § 2254 proceedings, all federal judges who have considered the case have recognized that the exclusion of the reliable third party culpability evidence proffered by Mr. Fry was unconstitutional. However, the district court and the panel majority in the Ninth Circuit concluded that the error was harmless under the standard set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946), and *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Review on certiorari is warranted in this case to make explicit a point which is implicit in past decisions of this Court: The unconstitutional exclusion of evidence of third party guilt, which would conclusively establish the accused's innocence if believed, is an inherently indeterminate type of error, which undermines the truth-finding function of a trial, and which is simply not amenable to harmless-error review. Further, even if the type of constitutional error involved in this case is subject to harmless-error scrutiny, review on certiorari is warranted to resolve a circuit conflict as to whether the *Chapman* standard or the

Kotteakos/Brecht standard applies in a § 2254 proceeding in which no *Chapman* review was conducted during antecedent state post-conviction proceedings. Finally, in light of recent decisions of this Court, which were handed down after the Ninth Circuit's decision in this case, and which are germane to central issues herein, a GVR disposition may be appropriate.

DISCUSSION

I.

A JURY'S GUILTY VERDICT IN A TRIAL IN WHICH RELIABLE EVIDENCE OF THIRD PARTY GUILT HAS BEEN UNCONSTITUTIONALLY EXCLUDED IS NOT AMENDABLE TO HARMLESS-ERROR REVIEW, WHEN THE EVIDENCE, IF CREDITED, WOULD CONCLUSIVELY ESTABLISH THE INNOCENCE OF THE ACCUSED.

The State Attorney General argues that certiorari ought not to be granted in this case because review is sought with respect to the Ninth Circuit's application of a settled rule of law, namely the harmless error rule. *See* Brief in Opposition at 3-4. However, as noted in Mr. Fry's petition, there is no precedent for application of the harmless error rule in the context in which it was applied in the instant case. Indeed, there is no precedent for treating a trial court's unconstitutional exclusion of indisputably reliable evidence of third party guilt as harmless.[1] The absence of

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[1] As the State Attorney General acknowledges at page 7 of the Brief in Opposition to Mr. Fry's Petition for a Writ of Certiorari, the reliability of the unconstitutionally

any precedent in this regard is unsurprising, as it simply makes no sense to characterize such outcome-influencing error as harmless. The exclusion from a trial of reliable evidence that someone other than the accused committed the charged offense is, *ipso facto*, harmful to the accused.

While this Court has never explicitly held that a trial court's unconstitutional exclusion of reliable evidence of third party guilt cannot be treated as harmless, such a conclusion is implicit in this Court's decisions in *Holmes v. South Carolina*, 547 U.S.___, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967).

This case presents an opportunity for this Court to state this rule explicitly. Such a rule is necessary in order to safeguard the primacy of the truth-finding function of criminal trials. *See Chambers v. Mississippi*, 410 U.S. at 295 (Denying the accused the opportunity to present exculpatory evidence "calls into question the ultimate 'integrity of the fact-finding process.'"); *Tehan v. United States*, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth...."); Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, 99 (1996) ("None of the trial's functions [is] more central to its legitimacy than the

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excluded evidence in this case is "a given...."

search for truth. For if the trial does not effectively develop the facts and comprehensively present them to the factfinder, trial justice is serendipitous.") (footnote omitted).

In the case at bar, it is now undisputed that reliable evidence of third party guilt was excluded from the trial which resulted in Mr. Fry's conviction and life sentence. In such a case, the State Attorney General's reliance on the general rule that harmless error analysis applies to a trial court's erroneous exclusion of defense evidence is misplaced. Mr. Fry has no quarrel with this general rule, and this Court has recognized this general rule. *Crane v. Kentucky*, 476 U.S. 683, 691 (1986). However, consideration of the purpose and scope of the harmless-error rule leads to the conclusion that the rule is inapposite when the criminal conviction under review occurred in a jury trial where the trial court undermined the jury's truth-finding function by excluding reliable third-party culpability evidence proffered by the defense.

"Harmless-error review looks ... to the basis on which 'the jury *actually rested* its verdict.'" *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in the original) (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991)).

> "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely

> unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee."

Id (emphasis in the original).[2]

In *Sullivan*, this Court held that error which consisted of a trial court's failure to give a proper reasonable doubt instruction to the jury was not amenable to harmless-error review, because the error necessarily precluded the jury from rendering a verdict of guilty beyond a reasonable doubt, thereby leaving "no *object* ... upon which harmless-error scrutiny [could] operate." *Id.* at 280 (emphasis in the original). In such a case, [a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judges the defendant guilty.'" *Id.* at 281 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).

Essentially the same situation obtains here: The trial court's error in failing to allow the jury to receive reliable evidence that someone other than Mr. Fry committed the homicide with which Mr. Fry was charged precluded the jury from

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[2] "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.* at 280.

determining where the truth lies in this case, i.e., reaching a meaningful verdict.[3] Similarly, in *Chambers v. Mississippi*, 410 U.S. 284, this Court's decision that a trial court's erroneous exclusion of reliable third-party-culpability evidence necessitated reversal, *id.* at 302-303, "rest[ed] on the ultimate impact" of the exclusion of the evidence. *Id.* at 298.[4] Thus, in the instant case, as in *Sullivan* and *Chambers*, constitutional error occurred which left no object, i.e., no verdict, upon which harmless-error scrutiny can operate. No reviewing court can do anything but speculate what result Mr. Fry's jury would have reached had the jury been presented with the proffered, reliable evidence that someone other than Mr. Fry committed the crime in question.

This Court has recently characterized errors as unamenable to harmless-error review where the errors "'necessarily render[ed] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence[,]'" *Washington v. Recuenco*, ___U.S.___, 165 L.Ed.2d 466, 474, 126

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[3] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. at 19. Rules excluding proffered testimony of witnesses called by the defense have the "effect of suppressing the truth...." *Id.* at 20.

[4] As this Court explained in *Holmes v. South Carolina*, 164 L.Ed.2d 503, when a case is evaluated without regard to proffered exculpatory evidence, "no logical conclusion can be reached regarding the strength of" the exculpatory evidence. *Id.* at 513.

S.Ct. 2546, 2551 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999), and/or where the nature of the error is such that its assessment would involve "a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, ___U.S.___, 165 L.Ed.2d 409, 420, 126 S.Ct. 2557, 2565 (2006).[5]

The error in this case is error of this ilk. Just as the trials in *Washington v. Texas*, *Chambers v. Mississippi*, and *Holmes v. South Carolina* were rendered fundamentally unfair and unreliable by the exclusion of critical and/or reliable evidence of third party guilt, Mr. Fry's trial was compromised by an error which "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. at 295. And, because the jury in Mr. Fry's trial was not afforded the opportunity to evaluate the testimony of the witness who would have described her cousin's confession to the crime for which Mr. Fry is now imprisoned, the effect of this error cannot be characterized as anything other than inherently indeterminate. Thus, the erroneous exclusion of this evidence necessitates reversal.

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[5] *See* 5 LaFave, Israel & King, *Criminal Procedure*, § 27.6(d) (2d ed. 1999) ("Undoubtedly the characteristic of violations requiring automatic reversal most frequently mentioned by the Supreme Court is the 'inherently indeterminate' impact of the violations upon the outcome of the trial.").

Alternatively, even if the constitutional error in the instant case were deemed amenable to harmless error review, the error cannot be deemed harmless. Specific factors in this case compel this conclusion: It took the State three trials to convict Mr. Fry, with the first two trials ending in deadlock due to evenly divided juries. App. 4a, 45a. The jury in the third trial deliberated for an extraordinarily lengthy period — five weeks. App. 4a, 45a. At one point, the jury had declared itself deadlocked 7-5. App. 45a. In addition to the excluded exculpatory evidence, Mr. Fry adduced an abundance of evidence pointing to his innocence. App. 45a. Finally, the witness who was erroneously precluded from testifying "was the only unbiased witness presented by either side." App. 4a. Serious constitutional error under these circumstances cannot be deemed harmless under any measure.

II.

REVIEW ON CERTIORARI IS WARRANTED TO RESOLVE THE CIRCUIT CONFLICT CONCERNING THE APPLICABLE STANDARD OF HARMLESS-ERROR REVIEW IN § 2254 CASES WHERE NO *CHAPMAN* REVIEW HAS BEEN CONDUCTED IN THE STATE JUDICIARY.

The instant case is a § 2254 case in which lower court determinations concerning Mr. Fry's entitlement to relief have turned on application of

Kotteakos/Brecht rather than *Chapman*.[6] Indeed, the district court expressly stated that it could not rule out prejudice due to the constitutional error in this case. App. 54a. However, applying *Brecht*, that court concluded that the error did not have a substantial and injurious effect on the jury's verdict. App. 54a-55a.[7] Likewise, the panel majority in the Ninth Circuit applied *Brecht*, despite the fact that "the state appellate court failed to conduct a meaningful prejudice review." App. 3a.

In *Brecht*, this Court relied on "the State's interests in the finality of convictions" and concerns of "comity and federalism" to justify application of the *Kotteakos* harmless-error standard in federal habeas proceedings. *Brecht*, 507 U.S. at 631, 635. "[T]he *Brecht* majority apparently premised these justifications on an assumption that a finding of harmlessness by the state courts under the more stringent *Chapman* rule always will precede habeas corpus review of the harmlessness question...." 2 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure*, § 31.1 n. 19 (5th ed. 2005). Because of this underlying premise, "the Eighth Circuit has limited *Brecht* to situations in which the state courts in fact

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[6] *Cf.*, *United States v. Dominguez Benitez*, 542 U.S. 74, 86-87 (2004) (Scalia, J., concurring in the judgment) (questioning whether application of one standard rather than the other makes any difference).

[7] As noted in Mr. Fry's petition, the district court improperly looked to Mr. Fry to shoulder the burden of making the showing of a substantial and injurious effect.

previously applied the *Chapman* rule." *Id.* (citing *Barrett v. Acevedo*, 169 F.3d 1155, 1164 (8th Cir.) (*en banc*), cert. denied, 528 U.S. 846 (1999); *Seiler v. Thalacker*, 101 F.3d 536, 539 (8th Cir. 1996), cert. denied, 520 U.S. 1175 (1997); *Fields v. Leapley*, 30 F.3d 986, 991 (8th Cir. 1994)). As the State Attorney General has observed, a number of circuits have concluded that *Brecht* applies, regardless of whether the state judiciary applied *Chapman* during the course of direct review. *See* Brief in Opposition at 7. In the Ninth Circuit, one panel majority adopted the rule that *Brecht* applies uniformly in all § 2254 cases, *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir.), cert. denied, 531 U.S. 1037 (2000), but another panel thereafter treated the question as still open. *Allen v. Woodford*, 395 F.3d 979, 1013 n. 6 (9th Cir. 2005). And, the Second Circuit has left the question open. *Lyons v. Johnson*, 99 F.3d 499, 503 (2d Cir. 1996).

Thus, the law on this issue is unsettled in the circuits. The State Attorney General's suggestion to the contrary is factually inaccurate. Under Rule 10(a) of the Rules of the Supreme Court of the United States, review on certiorari is warranted to resolve this conflict.

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III.

A GVR DISPOSITION MAY BE WARRANTED IN LIGHT OF THIS COURT'S RECENT DECISIONS IN *HOLMES* AND *HOUSE*.

As discussed in Mr. Fry's petition, this Court's recent decisions in *Holmes v. South Carolina*, 164 L.Ed.2d 503, and *House v. Bell*, 547 U.S.___, 165 L.Ed.2d 1, 126 S.Ct. 2064 (2006), involve decision-making with respect to issues which are pertinent in the instant case. In *Holmes*, this Court reversed a conviction, without any discussion of harmless error, where the conviction was tainted by the unconstitutional exclusion of important evidence of third party guilt, which, "if believed, [would have] strongly support[ed] a verdict of not guilty." 164 L.Ed.2d at 512. In *House*, this Court stressed the compelling nature of third-party confession evidence provided by unbiased witnesses. 165 L.Ed.2d at 30-31.

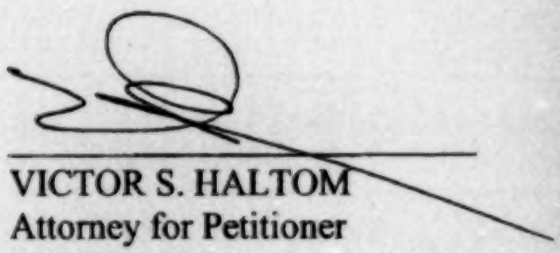
Thus, an implicit component of the *Holmes* decision appears to be that the erroneous exclusion of critical evidence of third party guilt is a type of error which is not amenable to harmless-error review. A GVR disposition would enable the Ninth Circuit to consider and apply this implicit principle in the instant case, which also involves the erroneous exclusion of critical evidence of third party guilt. Additionally, a GVR disposition would enable the Ninth Circuit to consider and apply the principle relied upon in *House*, that evidence of a third party

confession provided by a neutral witness has significant probative force. This principle is critically important in the instant case, as the constitutional error in Mr. Fry's trial involved the exclusion of the testimony of the only unbiased witness available to testify concerning a third party's confession to the crime for which Mr. Fry has been convicted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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Attorney for Petitioner
JOHN F. FRY

November 7, 2006

In the Supreme Court of the United States

No. **06-5247**

JOHN F. FRY, PETITIONER

v.

CHERYL K. PLILER, Warden, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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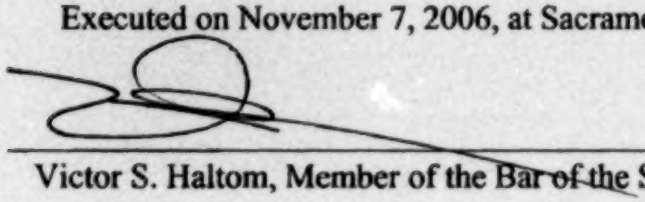

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November 7, 2006

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I am also submitting for filing a certificate of service. In that regard, I am enclosing an original, plus three copies of said certificate. Please file the original and two copies and return an endorsed copy to my office in the enclosed return envelope.

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VSH/srh

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